

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 11, 2004 Session

MARILYN JANE SCHULZ GORDON v. DAVID LOUIS GORDON

Appeal from the Circuit Court for Jefferson County
No. 18,749 - IV O. Duane Slone, Judge

No. E2003-01659-COA-R3-CV - FILED OCTOBER 18, 2004

Marilyn Schulz Gordon (“Wife”) filed for divorce after thirteen and one-half years of marriage to David Louis Gordon (“Husband”). Wife works as a physician and earns a substantial income. Husband is a photographer but was voluntarily unemployed throughout the entire marriage. The Trial Court emphasized several factors when making a distribution of the marital property. In particular, the Trial Court discussed: Husband’s minimal contribution to the acquisition of assets; Husband’s minimal to nonexistent contribution as a homemaker, and; Husband’s significant dissipation of the marital assets. The Trial Court divided the marital property in a manner which resulted in Wife being awarded almost three-fourths of the marital property as valued by the Trial Court. Husband appeals claiming the Trial Court’s division of the marital property was inequitable. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Kevin W. Shepherd, Maryville, Tennessee, for the Appellant David Louis Gordon.

C. Dwaine Evans, Morristown, Tennessee, for the Appellee Marilyn Jane Schulz Gordon.

OPINION

Background

This appeal arises from an acrimonious divorce proceeding which began in September of 2002 when Wife filed a complaint for divorce. In her complaint, Wife claimed Husband was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties. Husband answered the complaint and filed a counterclaim seeking a divorce on the same grounds. Wife was forty-seven years of age and Husband was forty-eight when this litigation began. The parties had been married for thirteen and one-half years and had two minor children, a daughter who was twelve years old and a son who was eleven.

After a three day trial, the Trial Court entered its Final Judgment in June of 2003. In its Final Judgment, the Trial Court specifically noted that while Wife exaggerated somewhat, the Trial Court found her testimony to be “extremely credible” and Husband’s testimony to be “non-credible.” The Trial Court found that Wife was an established physician with a substantial income. Husband, however, “is and has been unemployed during the course of the marriage.” The Trial Court also found Husband had physically and emotionally abused Wife, and was habitually intoxicated during the vast majority of the marriage. Accordingly, the Trial Court awarded Wife a divorce based on Husband’s inappropriate marital conduct. The Trial Court divided the marital property. The Trial Court also denied Husband’s request for alimony.

The sole issue on appeal involves the Trial Court’s division of the marital property. In dividing the marital property, the Trial Court began by determining the monetary value of various disputed items. Prior to setting forth its conclusions on the particular assets each party would be awarded, the Trial Court made the following observations:

In dividing the marital property of the parties, the Court adhered to the factors regarding distribution as set forth in T.C.A. § 36-4-121(c), *i.e.*, the duration of the marriage, the age, the physical, mental, and emotional health, vocational skills, employability, earning capacity, estate, financial liabilities and needs of each of the parties. Particularly, the Court considered the relative ability of each of the parties for future acquisition of capital assets and income and found that the distributions outlined hereafter would afford both parties (based upon [Wife’s] income and the cash distribution to [Husband]), future opportunity of acquisition of capital assets and income. The Court put significant focus and weight on factor number five, the contribution of each party to the acquisition, preservation, appreciation, depreciation, or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker and wage earner or parent. The Court specifically finds that [Husband] has not made any meaningful contribution to the

acquisition of any of the properties and very minimal involvement other than possibly locating the parties' properties. The Court credited, to some extent, [Husband's] contributions but not to the extent that [Husband] attempted to persuade the Court that is should.

With regard to preservation and dissipation of the marital property, the Court finds that [Husband] has made minimal to no contributions to the appreciation in value of any of the properties ... and that his contributions as a homemaker were nonexistent to minimal. Further, the Court finds that with regard to the Gordon Family Limited Partnership property and the marital residence that [Husband] made little, if any, contributions in that regard in that he hired lawn care personnel, hired people to maintain the inside of the home, and that the wages of [Wife] were the sole method of acquiring those assets. The Court further finds that [Husband] dissipated the parties' marital estate by his failure to seek any meaningful employment whatsoever, that he was wasteful in spending the money on alcohol and cigarettes in the thousands of dollars, that he hired people to do such things as even feed his pets, and that while he had no employment, he hired nannies to take care of the children, and did no lawn care.

The Trial Court then awarded Husband \$506,088 in marital property, almost all of which was in various bank accounts and was liquid. This was, however, only a little more than one-fourth of the total marital estate as valued by the Trial Court. Husband appeals claiming the result reached by the Trial Court is inequitable and that he is entitled to more of the marital property.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Tenn. Code Ann. § 36-4-121(c) requires a trial court to consider all relevant factors when making an equitable distribution of marital property, including:

- (1) The duration of the marriage;

- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, when dividing marital property:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because

each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

King v. King, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 Tenn. App. LEXIS 100, at *11-12 (Tenn. Ct. App. Feb. 9, 1998), *no appl. perm. appeal filed*). In the present case, Husband emphasizes that he is not asking necessarily for an “equal” distribution of the marital assets. Rather, he is asking to be awarded a greater percentage of the marital property than that awarded to him by the Trial Court in order to make the overall distribution equitable.

In accordance with Rule 7 of the Rules of the Court of Appeals, both parties attached to their briefs an appendix setting forth the value of the assets awarded to each party as well as their respective liabilities. The two appendices are virtually identical with the exception of one entry pertaining to the value of their interest in the Gordon Family Limited Partnership (“GFLP”). The GFLP’s principal asset is a villa on St. Barth’s island in the Caribbean. There are 82 total shares in GFLP, comprised of 2 general partnership shares and 80 limited partnership shares. At trial, Edgar H. Gee, Jr., (“Gee”) testified as an expert witness on Wife’s behalf. Gee is a certified public accountant who specializes in several areas, including business valuation. Gee testified that Husband and Wife each owned 30.49% of the total shares, and each of the parties’ two children owned 19.51%. Gee gave his expert opinion on the current value of this asset, and the Trial Court specifically stated it found this testimony “helpful” when ultimately concluding that the shares owned by Husband and Wife in GFLP had a combined value of \$1,070,000. In their briefs, Husband listed the value of their GFLP shares at \$2,200,000, while Wife listed their value at \$1,070,000. The Trial Court found the value of these shares to be \$1,070,000. While Husband in his appendix does list the value of their interest in GFLP at \$2,200,000, he nowhere in his brief articulates any argument or reasons showing that the Trial Court abused its discretion in valuing this asset at \$1,070,000. The evidence does not preponderate against the Trial Court’s finding as to the value of this asset. For this reason and also because Husband never argues that the value assigned to the GFLP shares by the Trial Court was an abuse of discretion or otherwise in error, we will accept the value of this asset as found by the Trial Court.

The value of the marital assets totaled \$2,511,735, and there was a total of \$499,391 in corresponding marital debt. From these totals, Wife was awarded \$2,005,647 in assets, but was held responsible for the entire \$499,391 in marital debt. This leaves Wife with a net property award valued at \$1,506,256. Husband was awarded the remaining assets worth \$506,088 and was held

responsible for none of the marital debt. From a percentage standpoint, Wife ended up with a net award of 74.85% of the marital property, and Husband was awarded the remaining 25.15%.¹

On appeal, Husband argues that the Trial Court undervalued his contributions to the household and the parties' accumulation of assets. Husband does not dispute the fact that, during the entire marriage, he never was gainfully employed. He also does not dispute the fact that Wife was employed as a physician and all of their marital assets were purchased from Wife's substantial earnings. Husband claims he contributed in other ways, such as when he located the marital home, negotiated its purchase, and then assisted with a few initial renovations. Unfortunately, we cannot tell from the record whether Husband's negotiations resulted in a good deal for these parties. We do know, however, that once the home was purchased Wife made all of the house payments. Husband also claims he "traveled through several islands in the Caribbean" looking for investment property. While doing this, he located the villa on St. Barth's island and negotiated its purchase. It is undisputed that the value of this property has increased since it was purchased. Even though Husband's locating this property may account for something, it really does not account for much when one considers that Wife made the \$600,000 down payment and has made all mortgage payments since the initial purchase. Locating the occasional piece of property which Wife then paid for is primarily what Husband claims he did to help the parties accumulate their assets during their marriage of thirteen and one-half years. The Trial Court found Husband's contribution to the acquisition of assets as "very minimal" and not meaningful. We could not agree more with this finding.

While Husband did virtually nothing to contribute to the acquisition of marital assets, his efforts at dissipating them were substantially more effective. According to Wife, for years Husband withdrew \$200 from the bank every couple of days to buy beer, cigarettes, and gasoline for his truck. Wife testified that during the years 1999 through 2002, Husband spent on average nine to ten weeks per year at their villa on St. Barth's island. While at the villa in 2001, Husband withdrew over \$11,000 in cash and charged all of his meals to credit cards. In 2002, he withdrew \$14,643.24 in cash in addition to numerous credit card charges. While on the island, Husband routinely hired chauffeurs to drive him around the island. On at least one occasion Husband rented a yacht to the tune of \$20,000.

Husband also claims he was a stay-at-home dad and that the Trial Court undervalued his efforts in this regard. According to Husband, "if the roles [had been reversed], it is unlikely that the Court would have found a stay-at-home mother to have not contributed to the household." It is undisputed that throughout the marriage Wife was working substantial hours as a physician and Husband was not employed outside of the home. We agree with Husband that when dividing marital property, a party will not be penalized because he or she fulfilled the role of homemaker and was not employed outside of the home. Tenn. Code Ann. § 36-4-121(c) specifically states that "the contribution of a party as homemaker or wage earner [should] be given the same weight if each party

¹ In his brief, Husband argues he was awarded only 20% of the marital property. However, as noted previously Husband relied on an improperly high value for their interest in GLFP.

has fulfilled its role.” Accordingly, we must examine Husband’s contributions to the household to see if he “fulfilled” his role.

What we have here is an otherwise healthy adult who was employed as a photographer prior to the marriage. Husband was thirty-four years old when the marriage began. Upon marrying Wife, Husband immediately quit working and, as he claims, assumed the role of homemaker. What a “homemaker” does is by no means set in stone and certainly will vary from household to household depending on many factors such as the health of the homemaker, whether there are any children, etc. With this in mind, we will examine Husband’s contributions to the household as found by the Trial Court. It is undisputed that full-time nannies were hired to care for the children. Thus, Husband cannot seriously claim that he stayed home to take care of the children. Because Husband did not want to drive the children to school in Knoxville from their home in Dandridge, he hired someone to do this for him. In his brief, Husband states he did this because “he did not want to drive the children to school, as he thought it would be more expensive in the long run to wear out his Land Cruiser.” Husband would not do any housework and, therefore, maids were hired to clean the house. Along this line, Wife testified that throughout their entire marriage she never witnessed Husband put a single dish into the dishwasher. Husband certainly did not occupy his time in the yard given the fact that he hired people to do all of the yard work. According to Wife:

We hired someone to come in on Wednesday, garbage day, to remove the garbage, as [Husband] thought it was beneath him to pick up garbage and put it outside the door. Then he hired someone separately to feed his dogs and buy the dog food for his dogs.

Even though he never performed any of the services that were hired out to nannies, maids, chauffeurs, landscapers, dog feeders, etc., Husband claims that the simple fact that he hired these people establishes his contribution to the household. According to Husband, “[t]he law does not require that the parent actually provide all of the services as a homemaker. The fact that [Husband] arranged for these needs to be met shows his contribution.” We disagree with Husband for two primary reasons. First, the amount of time actually invested in hiring these people over the course of a thirteen and one-half year marriage would be minimal at best. Second, this argument would have some merit if Husband had contributed in any way to the funds used to pay these workers. Husband may have written the checks to pay these people, but the funds came exclusively from Wife’s employment as a physician. Husband’s contribution was, as found by the Trial Court, minimal at best.

This Court would be hard pressed to find a case from this State involving a spouse who has contributed less to maintaining the household and acquiring assets, and who has done more to dissipate the marital estate than was done by Husband in this case. The evidence in the record presented to us does not preponderate against any of the factual findings of the Trial Court. We conclude that the Trial Court properly considered all relevant factors set forth in Tenn. Code Ann. § 36-4-121(c), and given the facts of this case, that it was well within its discretion when it

determined that certain of these factors were more relevant than others. We believe the overall property distribution was equitable, and the judgment of the Trial Court is affirmed.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, David Louis Gordon, and his surety.

D. MICHAEL SWINEY, JUDGE